

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



# 74-1778 ORIGINAL

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To be argued by  
BENEDICT GINSBERG

In The  
**United States Court of Appeals**

For The Second Circuit

CORWIN CONSULTANTS, INC.,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee,*

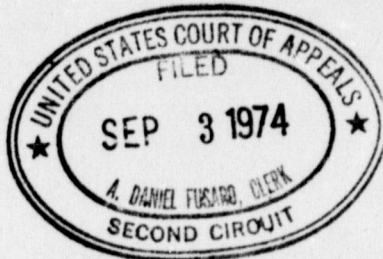
and

SAMUEL A. CULBERTSON, II,

*Appellee-Appellant.*

*On Appeal from the United States District Court for the  
Southern District of New York.*

**BRIEF FOR APPELLANT, CORWIN CONSULTANTS, INC.**



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
CORWIN CONSULTANTS, INC.,

Docket No. 74-1778

Appellant,

- v -

THE UNITED STATES OF AMERICA,

Appellee,

SAMUEL A. CULBERTSON II,

Appellee-Appellant.  
-----X

Preliminary Statement

This appeal involves the question of priority as between a perfected judgment lien and a Federal tax lien. The appellant claims priority for the failure of the United States of America (hereinafter referred to as "USA") to file

its tax lien in the county in which the debtor resides, or, alternatively, in Washington, D. C., where filing is required, when, as here, the debtor resides outside the United States.

### The Facts

The petitioner, Corwin Consultants, Inc. (hereinafter sometimes referred to as "Corwin"), is a perfected judgment lien creditor of one Marion Harper, Jr. (hereinafter referred to as "Harper"). There is no dispute as to the amount of the Corwin lien, or that it is a perfected judgment lien.

The Corwin judgment was entered in the Office of the Clerk of New York County on May 23, 1972. An execution was duly issued to the Sheriff on October 3, 1972, and he promptly levied upon the respondent, The Interpublic Group of Companies, Inc. (hereinafter referred to as "Interpublic").

The property which is subject to the Corwin lien is a sum of money that has accumulated to Harper's credit under the terms of his agreement with Interpublic, and which would have been paid by Interpublic to Harper, but for restraining



notices served upon Interpublic by Corwin and other creditors of Harper.

Prior to the issuance of execution on the Corwin judgment, two events (one now moot) occurred, which formed the basis of the claim of the USA to priority over Corwin:

1. The USA filed a notice of tax lien in Westchester County, against Harper, on account of unpaid income taxes for the year 1968.

2. On the same day that Corwin perfected its judgment lien, by levy, the USA filed another notice of tax lien on account of unpaid incomes for the years 1963, 1964 and 1965. The latter lien was filed in New York County.

During the pendency of the proceedings below, the claim of the USA for unpaid income taxes for 1968 was substantially satisfied, and we may disregard the lien filed in Westchester County in the present consideration of the issue of priority. To the extent that there may be a small unpaid balance of income taxes for 1968, the sum held by Interpublic is sufficient to satisfy the Corwin judgment and that small balance, if any, still due to the USA.

The second event, and the only relevant one, for the purpose of determining whether Corwin or USA has priority to the funds being held by Interpublic, is the lien filed in New York County, by USA.

It is the petitioner's contention that the lien filed in New York County is a nullity as against judgment creditors for failure to comply with the provisions of the statute (26 U.S.C. § 6323). The defect in the filing was the failure to file the notice of Federal tax lien in the county in which the debtor resided, or, alternatively, where the debtor is not a resident of the United States, in Washington, D.C.

#### POINT I

THE TAX LIEN FILED BY THE USA IN NEW YORK COUNTY  
IS A NULLITY AS AGAINST JUDGMENT CREDITORS FOR  
FAILURE TO COMPLY WITH 26 USC § 6323.

On October 3, 1972, the USA filed a notice of tax lien, in New York County. It claims the fund accumulated by and in the possession of Interpublic, who had not paid it to Harper, as it would otherwise have done, because Corwin had previously served a restraining notice which effectively



froze the money in Interpublic's possession. The filing of this notice of tax lien was not in compliance with the provisions of 26 USC § 6323, and therefore did not operate to defeat the rights of Corwin as a judgment lien creditor. It is undisputed that in order to perfect a tax lien as against judgment creditors, the USA must file its notice of tax lien in the county in which the taxpayer resides. The opinion below correctly excerpts the relevant provisions of the statute as follows:

"A §6321 lien has priority against judgment creditors if notice has been filed in accordance with §6323, which provides in relevant part:

"(a) The lien imposed by section 6321 shall not be valid as against any...judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate.

\* \* \*

"(f)(1) The notice referred to in subsection (a) shall be filed.

"(A)(ii) In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated

\* \* \*

"(2) For the purpose of paragraph (1), property shall be deemed to be situated -

\* \* \*

"(B) In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed." (Record p.145a-146a)

Prior to the filing of the lien in New York County, Harper, who had owned real estate in Westchester County, when the USA lien was filed there in 1970, had fled from his numerous creditors to Europe, to take up residence at La Crique, 1196 Grand, Switzerland (66a, 67a). There can be no dispute as to the correctness of our contention in this regard, since the portion of the record from which we quote is the levy issued by the USA dated October 18, 1972.

It is clear from the decision of the Court below (a) that the USA did not comply with the statute, and (b) that the rationale of the Court's awarding priority to the USA, and in fact excusing non-compliance, is that if the USA is not given priority, Harper's taxes will remain unpaid. We do not regard this as an appropriate basis for a judicial determination.

We quote again from the opinion below, where the



Court, after quoting the appropriate provisions of the statute, said:

"It is undisputed that the IRS notice of lien filed in Westchester in 1970 meets the requirements of the quoted provisions, since Harper was at the time a resident of that county. Consequently, we find the IRS 1970 lien (covering 1968 taxes) has first priority. The parties lock horns, however, on the validity of the 1971 and 1972 IRS liens (the 1971 lien for the same 1968 taxes and the 1972 lien for 1963, 1964 and 1965 taxes). The IRS argues that its filing of the 1971 and 1972 liens at the situs of the debt meets the requirements of §6323, while Corwin counters that because Harper's actual residence cannot be verified, the filing does not meet the requirements of §6323(f)(1)(A)(2) and (f)(2)(B). Corwin argues, in essence, that the IRS can never perfect a tax lien unless it files in the taxpayer's demonstrable county of residence." (146a)

It will thus be noted that the Court below, recognizing that New York County was not Harper's residence, sought to establish a new basis for determining the proper place for the filing of the lien, to wit, "the situs of the debt", a basis not recognized or provided for in the statute.

To the extent that the place where the "property shall be deemed to be situated" [§6323 (F) (A) (2)] the statute says:

"(B) In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed." (Recordp 145a-146a)

The opinion below then discussed "substantial compliance" and "due diligence", as though the failure to observe a specific requirement, to wit, filing in the county of the debtor's residence, can somehow be excused on the theory that something else that was done was an indication of either "due diligence" or "substantial compliance".

"Diligence" has nothing whatever to do with it. If Harper was not a resident of New York County, and it is quite clear that he was not, we fail to see how filing in New York County is an indication of diligence. One might ask, "diligence as to what"? Similarly, filing in New York County is not "substantial compliance" with the requirement to file in the county of residence, or where the debtor resides in Europe, in Washington, D. C.

Further rationalizing its decision below, the Court said:

"To deprive the government of the right to proceed against the taxpayer's property in any case where his residence is unknown (or he makes himself scarce) would allow tax evasion by the mere disappearance of the taxpayer. The due process clause does not require such a result, particularly where (as here) it is reasonable to



assume the taxpayer knows he is delinquent in his payments and that some consequences are bound to follow from his delinquency."

Here, again, we must observe, as we did above, that the foregoing is hardly the basis for a judicial determination. The issue is not whether the taxpayer "knows he is delinquent", or whether he knows that "some consequences are bound to follow from his delinquency".

The record does not indicate whether Harper knew he was delinquent, and for all we know, he fled from the country for other reasons. But even if we were to assume that he knew he was delinquent, such knowledge is not a substitute for complying with the statute. In this context, it should be noted that the USA is given such wide latitude in the perfecting of its lien that it cannot plead that it should be permitted to proceed in a non-statutory manner. If the notice cannot be filed in the county in which the debtor resides, because he has left the country, the simple alternative of filing in Washington, D. C. is available.

The decision states that unless compliance of the

filing requirement is waived, taxpayers would be given a method by which they could avoid paying taxes, to wit, disappearing. The decision therefore equates the rights of a taxpayer with the rights of competing judgment creditors. This is error. A taxpayer's assets are subjected to a lien in favor of the U.S. by the ministerial act of an assessment of tax deficiency by the Internal Revenue Service. That lien however, is not valid as against judgment creditors until notice of it is placed in the public record pursuant to 26 U.S.C. 6323. (U.S. v. Pioneer Am. Ins. Co. 374 U.S. 84, 10 L. Ed. 2nd 770).

We recognize that we rely entirely on the statute, and cite only one case in support of our position. The fact is there are no cases directly on the issue, and the Court below recognized that its attempt to arrive at a determination on the reasons stated in its opinion, is also without any supporting authority. On that point the opinion states: "There appears to be no authority on the question whether the "substantial compliance" or "due diligence" standard contended for by the IRS satisfies the notice requirements of Section 6321-3" (147a).



CONCLUSION

WHEREFORE, it is respectfully requested that the judgment below be modified to the extent of awarding the Corwin judgment lien priority over the federal tax lien for taxes due for the years 1963, 1964, 1965.

Respectfully submitted,

BENEDICT GINSBERG  
Attorney for Appellant Corwin

Dated: New York, New York  
August 28, 1974

## U.S. COURT OF APPEALS: SECOND CIRCUIT

CORWIN CONSULTANTS,

XEROX  
Appellant,

against

U.S.A.,

Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega,

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 3rd day of September 1974 at 100 East Park Ave., New York  
Room Foley Square, New Yorkdeponent served the annexed *Appellant's Brief* uponMaas, Levy, Friedman, Hirsch, Stern - Appellant's attorney for Appellee-Appellant  
Paul J. Curran - U.S. Attny. - Southern Dist. - Attorney for Appellee.the in this action by delivering <sup>2</sup> true copy thereof to said individual  
personally. Deponent knew the person so served to be the person mentioned and described in said  
papers as the Attorney(s) herein,Sworn to before me, this 3rd  
day of September

19 74

*Victor Ortega*

Print name beneath signature

VICTOR ORTEGA

*Robert T. Brin*ROBERT T. BRIN  
NOTARY PUBLIC, STATE OF NEW YORK  
NO. 31 - 0418950  
QUALIFIED IN NEW YORK COUNTY  
COMMISSION EXPIRES MARCH 30, 1975



